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## The Harmonization of Authority of Supreme Court, Constitution Court, and the Judicial Commission

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### ABSTRACT

*The Harmonization of the Authority between Supreme Court (MA) institutions The Constitutional Court (MK) and Judicial Commission (KY) is a must. It is done by way of revision of the Law of the Supreme Court, MK and KY for the harmonization of authority. However, if the revision finds a dead end, then the fifth amendment (5) of the 1945 Constitution of the State of the Republic of Indonesia (UUDNRI 1945) is limited to be reconstructed by the provision of Article 24B paragraph (1) of the 1945 Constitution by affirming the authority of KY clear so that it is not considered to interfere with judicial power. The harmonization can be done by adding an institution that oversees the authority of the Constitutional Court by performing reconstruction in Article 24B paragraph (1) so that there is no more tendency of absolute power. The supervised judge is a judge of the Supreme Court and the Constitutional Court.*

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### A. Introduction

Currently, there are still many parties that do not fully understand the institutional arrangements of the state in the 1945 Constitution of the State of the Republic of Indonesia (UUDNRI 1945) so that public debate and public relations issues often arise. Moreover, state institutions have undergone a

fundamental change in the results of the 1945 amendment of the 1945 Constitution. The fundamental change that affects the institutional order of the country is its salvation regarding the judicial power determined by the perpetrators is the MA and the Constitutional Court which before the amendment is only MA. In this paper, author will highlight the branch of judicial power, in particular the authority and supervision of the three institutions, namely the Supreme Court and the Court as the perpetrators of power, and the Judicial Commission (KY) which serves to support the realization of the Supreme Court as one of the independent judicial authorities to hold the judiciary to enforce law and justice. It is done through the role of KY in the appointment of Supreme Court justices as well as the role to maintain and uphold the honor, dignity and the behavior of judges.<sup>1</sup>

The regulation on the authority of Supreme Court, Supreme Court and Judicial Commission are regulated in the 1945 Constitution on Articles 24, 24A, 24B and 24C. The regulation on the authority of the judiciary is stipulated in Article 24 Paragraph (2) of the 1945 Constitution which states: "Judicial power shall be exercised by a Supreme Court and its subordinate courts within the general court, the religious court environment, the military court environment, and by a Constitutional Court."<sup>2</sup>

Furthermore, the authority of the Supreme Court is regulated in Article 24A Paragraph (1) of the 1945 Constitution which states: "The Supreme Court has the authority to hear an appeal, to examine statutory laws under the law, and to have other authorities granted by law." Besides stipulated in Article 24A Paragraph (1) of the 1945 Constitution, the Supreme Court's authority is also regulated in Article 28 paragraph (1) and (2) of Law of the Republic of Indonesia Number 14 Year 1985 regarding Supreme Court of State Gazette Number 73 Year 1985 and Supplement to State Gazette Number 3316.<sup>3</sup>

Furthermore, the role and authority of KY is stipulated in Article 24B Paragraph (1) of the 1945 Constitution which states: "The Judicial Commission is independent which has the authority to propose the appointment of Supreme Court Justices and has other powers in order to maintain and uphold the honor, dignity, and behavior of judges". Besides stipulated in Article 24B paragraph (1) of the 1945 Constitution, the authority of the Judicial Commission is also stipulated in Article 13 of the

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<sup>1</sup> M Gaffar Janedjri, *Penataan Lembaga Negara Sekretaris Jenderal Mahkamah Konstitusi*, (2006), p. 2.

<sup>2</sup> See Article 24 paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia.

<sup>3</sup> See Article 28 paragraphs (1) and (2) of the Law of the Republic of Indonesia Number 14 of 1985 on the Supreme Court of the State Gazette Number 73 of 1985 and Supplement to the State Gazette Number 3316.

Law of the Republic of Indonesia Number 18 Year 2011 concerning the Amendment of Law Number 22 Year 2004 concerning Judicial Commission of the State Gazette of the Republic of Indonesia Year 2011 Number 106 and Supplement State Gazette of the Republic of Indonesia Number 5250.<sup>4</sup>

Whereas the Court's authority is regulated in Article 24C Paragraph (1) of the 1945 Constitution which states: "The Constitutional Court has the authority to hear at the first and final level the decision is final to examine the law against the Constitution, to decide the dispute over the authority of the state institution whose authority is granted by The Constitution, to decide upon the dissolution of political parties, and to decide disputes concerning election results". Besides stipulated in Article 24C Paragraph (1) of the 1945 Constitution, the authority of the Constitutional Court is also regulated in Article 10 paragraphs (1), (2) and (3) of Law of the Republic of Indonesia Number 24 Year 2003 regarding the Constitutional Court of the Republic of Indonesia Year 2003 Number 98 and Supplement to the State Gazette of the Republic of Indonesia Number 4316.<sup>5</sup>

## **B. Research Method**

This research is normative research, which is the research of the principles of law, legal norms regarding value (norm) of concrete legal rules and legal systems.<sup>6</sup> This research uses several approaches, such as statute approach and conceptual approach.<sup>7</sup>

## **C. Research Result and Discussion**

### **1. Relations of the Constitutional Court and the Supreme Court**

The relationship between the Constitutional Court and the Supreme Court relates to the subject matter of judicial review. Each registered case shall be notified to the Supreme Court so that the examination of the case for

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<sup>4</sup>Besides stipulated in Article 24B paragraph (1) of the 1945 Constitution, the authority of KY is also regulated in Article 13 of the Law of the Republic of Indonesia Number 18 Year 2011 on the Amendment of Law Number 22 Year 2004 concerning Judicial Commission of the State Gazette of the Republic of Indonesia Year 2011 Number 106 and Supplement State Gazette of the Republic of Indonesia Number 5250.

<sup>5</sup>See Article 24C Paragraph (1) of the 1945 Constitution on Article 10 Paragraphs (1), (2) and (3) of Law of the Republic of Indonesia Number 24 Year 2003 regarding the Constitutional Court of the Republic of Indonesia Year 2003 Number 98 and Supplement to the State Gazette of the Republic of Indonesia Number 4316.

<sup>6</sup>Sudikno Mertokusumo, *Penemuan Hukum*, Yogyakarta: Liberty, (2009), p. 29.

<sup>7</sup>Theory Hutchinson, *Researching and Writing in Law*, Lawbook Co, Pymon NST 2009 Australia, (2002), p. 55. lihat juga dalam La Ode Angga, "The Formulation of Precautionary Principle in the Local Regulation of Regional Spatial Order Plan Based on Life Environment Sustainability in Maluku Province", *Journal of Law, Policy and Globalization*, 35, (2015), p. 3.

reviewing the law under the relevant law by the Supreme Court shall be suspended until the Supreme Court reads the verdict on the case of judicial review. It is intended to avoid any contradiction between the judicial review of the law conducted by the Constitutional Court and the testing of regulations under the law by the Supreme Court. Regarding the possibility of interstate authority disputes temporarily under the provisions of Article 65 of the Law of the Republic of Indonesia Number 24 Year 2003 regarding the Constitutional Court of the Republic of Indonesia of the Republic of Indonesia Year 2003 Number 98 and Supplement to the State Gazette of the Republic of Indonesia Number 4316, the Supreme Court is exempted from the provisions concerning the parties who can litigate in the Constitutional Court, particularly in relation to inter-agency authority dispute cases. Is this exclusion right? Surely this provision is not quite right, because in fact there is no good reason to exclude MA as a potential party? In a dispute authority case. One of the reasons why this exemption is held is that the legislator considers that as a fellow judiciary judicial institution, the Supreme Court should not be placed as a litigant in the Constitutional Court. The Supreme Court's verdict, like the Constitutional Court, is final, and therefore it is worried that if the Supreme Court becomes a party, its decision will be no longer final. In addition, concerns arise if the Supreme Court becomes a party to the dispute with the Constitutional Court, then the authority to decide unilaterally on the Constitutional Court. Therefore, a shortcut is taken to exclude the Supreme Court from the provisions concerning the parties who can litigate in the matter of constitutional authority disputes in the Constitutional Court. In fact, in reality, the Supreme Court may be involved in a dispute in exercising its authority with other state institutions according to the 1945 Indonesian Constitution of the Republic of Indonesia, beyond the final decision of cassation or judicial review. For example, when the post of vacant Vice Chairman of the Supreme Court is about to be filled, controversy has arisen, which institution is authorized to elect the Vice Chairman of the Supreme Court. Under the terms of the 1945 Constitution, the chairman and deputy chairman of the Supreme Court shall be elected from and by the members of the Supreme Court. However, according to the provisions of the old law on the then current Supreme Court, the election mechanism of the Vice Chairman of the Supreme Court is still being conducted by the Parliament. If the controversy continues and causes a dispute between the Government and the People's Legislative Assembly with respect to the authority possessed by the People's Legislative Assembly or the Supreme Court, then the Supreme Court must automatically act as a party in litigation in the Constitutional Court.<sup>8</sup>

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<sup>8</sup> Jimly Asshiddiqie, *Perihal Undang-Undang di Indonesia. Sekretariat Jenderal dan*

However, regardless of the above matters, it is clear that the provisions of Law No. 24 on 2003 regarding the Constitutional Court which excludes such Supreme Court may be accepted at least temporarily when the Constitutional Court itself is only established. If the practice of constitutional court administration has been developed in such a way, it is not impossible that one day the provisions of the Law on the Constitutional Court on such matters can be perfected accordingly. Thus, the relationship between the Constitutional Court and the Supreme Court relating to the status of the Supreme Court as one of the constitutional judges constituting the position and the status of the Supreme Court as the examiner of regulations under the law may be amended properly.

When there has been a dispute between the Financial Review Board (BPK) and the Supreme Audit Agency (BPK) in the matter of examination by the Supreme Audit Agency (BPK) on the court fee management in the court within the Supreme Court, the Supreme Court believes that the cost of the case is the litigation fund of the litigant party, therefore, it cannot be categorized as state finance which is the object of examination by BPK. To overcome this, both the Supreme Court argued that this could not be the object of dispute in the Constitutional Court, because the Supreme Court cannot be used as a party in litigation in Mk. To overcome this, as Chief Justice of the Constitutional Court at that time the writer took the initiative of holding talks with the Vice President and then with the President to resolve the dispute throughout of court (out of court settlement). Fortunately, it can be solved by agreement with the issuance of Government Regulation which regulates the management of case fee related to the provision concerning Non-Tax Revenue (PNBP) which surely will be able to be examined properly by BPK.<sup>9</sup>

That experience encourages the Constitutional Court to enact the Constitutional Court regulation that regulates the possibility of the Supreme Court becoming a litigant party in the dispute of state institutions in the Constitutional Court, namely by arranging exceptions to the provisions of the Constitutional Court Law which stipulates that the Supreme Court cannot become a party in litigation in the Constitutional Court. The Constitutional Court shall interpret the provisions that exclude the Supreme Court as a party to a case in the Constitutional Court in its stipulation is to the extent that the MA's decisions are in the exercise of its jurisdiction in the judicial sector. It means that all Supreme Court decisions, such as cassation, can no longer be held in the Constitutional Court, which may make the Supreme Court as the party charged. However, for other matters outside the case, such

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*Kepanitraan Mahkamah Konstitusi RI*, Jakarta, (2006), p. 23.

<sup>9</sup> *Ibid*.

as the matter of the administration of court fee management, it is not included in the sense that is exempted by Article 65 of the Constitutional Court Law.

## **2. Judicial Commission (KY)**

Article 24B Paragraph (1) of the 1945 Constitution states: "The Judicial Commission is independent in its capacity to propose the appointment of Supreme Court Justices and to have other powers to safeguard and uphold the honor, dignity, and behavior of judges." In paragraph (4) of that article is also determined: "The structure, position, and membership of the Judicial Commission shall be regulated by law". Read literally, then subject to be supervised by this KY are all judges according to UUDNRI 1945. That is, all judges in the ranks of MA and MK included in the sense of judge according to Article 24B paragraph (1). However, if traced in the history of the formulation of Article 24B paragraph (1), the provisions of Article 24C regulating the Constitutional Court are not subject to the regulatory purpose outlined in Article 24B concerning KY. The function of this commission was originally intended only to be related to the Supreme Court stipulated in Article 24A.

KY has the authority to propose the appointment of Supreme Court Justices, and therefore the legal subject supervised by KY is also the Supreme Court justices of the Supreme Court. However, since literally, Article 24B Paragraph (1) of the 1945 Constitution only mentions the words "... as well as the conduct of judges", not "... as well as the behavior of Supreme Court Justices", the interpretation of the function of the Judicial Commission under this paragraph is inevitably limited only to the Supreme Court Justices, but all the judges. However, the whole judge is meant to be limited to the judges within the Supreme Court and does not include the meaning of constitutional justices. Both historically and systematically by looking at the systematic sequence chapter by chapter, constitutional justices do not include subjects supervised by KY. However, based on a literal interpretation, a constitutional judge may also be included in the sense of a supervised judge under the provisions of Article 24B paragraph (1). Therefore, Law No. 22 on 2004 regarding the Judicial Commission embraces this last understanding, which is interpreting the word "judge". Likewise in Article 1 point of Law No. 18 on 2011 on the Amendment of Law No. 22 on 2004 concerning the Judicial Commission of the State Gazette of Law No. 106 on 2011 and Supplement to the State Gazette of the Republic of Indonesia Number 5250 stating that Judges are judges and an ad hoc judge in the Supreme Court and the Judiciary.

Article 24B Paragraph (1) of the 1945 Constitution extensively covers all levels of judges within the Supreme Court and all judges of the

Constitutional Court. The provisions on this matter can be seen in Chapter III on the authority and duties of KY, namely in the provisions of Articles 13 through 25 of Law No. 22 on 2004. Thus, the Judicial Commission functions as an oversight body of the Constitutional Court, namely through its authority to safeguard and uphold the honor, dignity, and conduct of constitutional judges as appropriate. But in its development, by the Constitutional Court, the article is declared contrary to the 1945 Constitution. Is it original intent? Article 24B, when formulated by the Working Body of the People's Consultative Assembly, is not related to the Constitutional Court at all. Conceptually, the institutionalization of KY is derived from the concept of internal ethical oversight within the institutional structure of the MA with the intention to work more effectively and independently, excluded from and stand alone outside the MA structure. Therefore, the existence of KY is only related to the Supreme Court and is totally unrelated structurally or functionally with the Constitutional Court. In fact, it can be said that the KY itself is not an institution that performs a separate state power function but only serves to support the existence of the Supreme Court as an institution that exercises judicial power, therefore it cannot be called a separate state high institution in the high interstate institutions as has been practiced. KY is not a high state institution, and therefore its chairman is not a proper state official to associate with political institutions and leaders of political institutions such as the MPR, DPR, DPD, and President / Vice President, because it can open space for the emergence of assumptions -the political forces will be able to easily intervene or affect the performance of the branch of judicial power as a result of the association between the higher state institutions and among such high officials. Ideally, the Chairman of the Supreme Court, Chief Justice of the Constitutional Court, and Chairman of the Judicial Commission who is in the territory of judicial power has a separate social environment outside the association between the branches of the power of the executive and legislative institutions.

Therefore, the 1945 Constitution provides that the Constitutional Court has four constitutional authorities and one constitutional obligation. The four authorities are: (1) to examine the law (UU) of the 1945 Constitution, (2) to decide on inter-agency authority disputes whose authorities are granted by the 1945 Constitution, (3) to decide disputes over election results, and (4) to decide the dissolution of parties political. While the obligation is to decide the opinion of the House of Representatives that the President and Vice President have been guilty of violating the law or no

longer fulfilling the requirements as President and Vice President as mentioned in the 1945 Constitution.<sup>10</sup>

### 3. Why Should a Constitutional Court be formed?

Essentially, the establishment of the Constitutional Court needs to be done because the Indonesian people make fundamental changes to the 1945 Constitution. In the framework of the First Amendment to Fourth Amendment UUDNRI 1945, the Indonesian nation has adopted new principles in the constitutional system, namely the principle of separation of powers and checks and balances 'as a substitute for the previous parliamentary supremacy system. With the amendment, the principle of a law-enforced state is affirmed by (a) the enforcement of law enforcement mechanisms beginning with the enforcement of the constitution as the supreme law. As a result of the amendment, (b) it is deemed necessary to establish mechanisms for determining possible authority disputes between institutions of equal standing, whose authorities are defined in the 1945 Constitution, (c) to institutionalize the role of law and judges who can control the processes and products of political decisions that only base themselves on the principle of 'majority rule'. Therefore, the functions of judicial review of the constitutionality of the law and the process of legal testing of the demands for dismissal of the President and Vice President are associated with the functioning of the Constitutional Court. Also, (d) there is also a need for mechanisms to resolve disputed conflicts that cannot be resolved through the usual judicial process, such as disputes over election results and demands for dissolution of political parties.

Such cases are closely related to the rights and freedoms of citizens in the dynamics of the democratic political system guaranteed by the 1945 Constitution. Therefore, the functions of dispute resolution over election results and the dissolution of political parties are also associated with the authority of the Constitutional Court.

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<sup>10</sup> Jimly Asshidiqie., *Ibid*.



longer fulfilling the requirements as President and Vice President as mentioned in the 1945 Constitution.<sup>11</sup>

#### **4. The Author's Analysis and Recommendations on the Harmonization of the Third Institution (MA, MK & KY) If Required State Arrangement**

As the end of this description, the author provides analysis and recommendations seen from the authority and the supervision of the three institutions MA, MK and KY if the arrangement of the future state is needed so that the harmonization of the authority of the three institutions.

##### **a. Analysis of Authority of MA, MK and KY as regulated in UUDNRI 1945**

###### **1) Authority of the Supreme Court**

The arrangements concerning the authority of the Supreme Court in Article 24A Paragraph (1) of the 1945 Constitution which states: "The Supreme Court has the authority to hear at the appellate level, to examine statutory laws under the law, and to have other powers granted by law." The authority of the Supreme Court according to Article 24A Paragraph (1) of the 1945 Constitution mentioned above, according to the authors is clear, does not have multiple interpretations, unlike the authority regulating the authority of Judicial Commission as set forth in Article 24B paragraph (1) of the 1945 Constitution which has multi-interpretation.

###### **2) The authority of the Constitutional Court**

The Constitutional Court's authority is stipulated in Article 24C Paragraph (1) of the 1945 Constitution which states: "The Constitutional Court has the authority to hear at the first and final level the decision is final to examine the law against the Constitution, to decide the dispute over the authority of the state institution whose authority is granted by Law -The Basic Chamber, to decide upon the dissolution of political parties, and to decide disputes concerning election results ". According to the author of the Constitutional Court authority in Article 24C Paragraph (1) of the 1945 Constitution mentioned above is clear, similar to the authority of the Supreme Court, the Constitutional Court also does not require multi-interpretation.

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<sup>11</sup> *Ibid.*

### **3) Authority of KY**

Furthermore, the roles and the authorities of KY are regulated in Article 24B Paragraph (1) of the 1945 Constitution which states: "The Judicial Commission is independent in its capacity to propose the appointment of Supreme Court Justices and has other powers in order to safeguard and uphold the honor, dignity, and behavior of judges". In paragraph 4 of article 24B, it shall also be determined: "Law shall regulate the structure, position, and membership of the Judicial Commission." When read literally, the subject to be supervised by this Judicial Commission is all judges according to the 1945 Constitution. That is, all judges in the ranks of the Supreme Court and the Court are included in the meaning of the judge according to Article 24B paragraph (1), because at the end of Article 24B paragraph (1) it states "... as well as the conduct of judges", here it does not declare "... as well as the conduct of the judge" means that KY has the authority to propose the appointment of a Supreme Court Justice and has other powers in order to safeguard and uphold the honor, the dignity of the dignity, "... and the conduct of the judge" the judges are both judges of both judges and constitutional judges. However, if traced in the history of the formulation of Article 24B paragraph (1), the provisions of Article 24C regulating the Constitutional Court are not subject to the regulatory purpose outlined in Article 24B concerning KY.<sup>12</sup> The function of this commission was originally intended only to be related to the Supreme Court stipulated in Article 24A. Judicial Vision is authorized to propose the appointment of a Supreme Court Justice, and therefore the legal subject supervised by the Judicial Commission is also the Supreme Court justices.

However, as the author mentions above, since literally, Article 24B Paragraph (1) of the 1945 Constitution only mentions the words "... as well as the behavior of judges", not "... as well as the behavior of Supreme Court", the interpretation of KY functions according to this paragraph inevitably not limited to the justices of the judge, but all the judges. However, the entire judge is intended to be limited to the judges within the Supreme Court and does not include the meaning of constitutional justices. Both historically and systematically by looking at the systematic sequence chapter by chapter, constitutional justices do not include subjects supervised by KY. However, based on a literal interpretation, a constitutional judge may also be included in the sense of a supervised judge under the provisions of Article 24B paragraph (1) above.

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<sup>12</sup> See Article 24B paragraph (1), the provisions of Article 24C of the 1945 Constitution.

**b. Supervision Analysis of the Supreme Court and (MA) the Constitutional Court (MK)**

**1) Supervision of MA**

The institution supervising the Supreme Court is a KY, according to Article 24B paragraph (1) of the 1945 Constitution which states: "The Judicial Commission is independent in its capacity to propose the appointment of a Supreme Court Justice and has other powers in order to safeguard and uphold the honor, dignity, and behavior of judges".

**2) Supervision of the Constitutional Court**

The institutions authorized to supervise the Constitutional Court have not been strictly regulated in the 1945 Constitution, although in Article 24B paragraph (1) of the 1945 Constitution which regulates the supervision of the Supreme Court states ... "as well as the conduct of judges", but here it is not stated explicitly "... as well as the behavior of judges constitution".

**D. Recommendations**

As the recommendation of the author of the three institutions of the Supreme Court, the Constitutional Court, and the Judicial Commission if the state arrangement, regarded from the regulation of authority as well as from the regulatory arrangements outlined in the 1945 Constitution, the author provides reconstruction as presented in the form of this table:

Type of Addition	The current arrangements of the Third Institution (MA, MK & KY)	The third Recommendation of the Institution (MA, MK & KY) Required State Arrangement
Strengthening Supreme Court Supervision & the presence of a constitutional justice oversight body	-In the arrangement of the above three institutions (MA, MK, and KY), no institution oversees the authority of constitutional justices there is a tendency of absolute power if there is no supervision. The supervised Judge is only a judge within the MA's environment, contained in Article 24B paragraph (1) stating: The Judicial Commission is independent	There should be an addition of an institution that oversees the authority of the Constitutional Court by performing reconstruction on Article 24B paragraph (1) so that there is no more tendency of absolute power. The supervised Judge is the judge of MA and MK Formulation authors in Article 24B paragraph (1) states:

	and has the authority to propose the appointment of a Supreme Court Justice and has other powers in order to safeguard and uphold the honor, dignity, and conduct of judges.	"The Judicial Commission shall be independent in its capacity to propose the appointment of Supreme Court justices and judges of taxation and to have other powers to safeguard and uphold the honor, dignity, and behavior of Supreme Court Justices and Constitutional Justices.
Strengthening the Authority of KY	KY is only given the authority to provide recommendations to the Judge a naughty.	KY should be given the authority to crack down on a bad judge is not limited to providing recommendations.
Harmonization of authority Third Institute MA, MK, & KY	The absence of harmonization of authority between MA, MK, and KY.	There must be a harmonization of authority between the Supreme Court, the Court and the Judicial Commission by revising the Supreme Court, MK and KY laws for the harmonization of authority. However, if the revision finds a dead end, then the 5th amendment of the 1945 Constitution of the 1945 Constitution is limited to be made, reconstructing the provisions of Article 24B paragraph (1) of the 1945 Constitution by affirming the authority of KY clearly so as not to be considered to interfere with the judicial authority.

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